

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Vaya Telecom, Inc. For)	CC Docket No. 01-92
Declaratory Ruling Regarding LEC-to-LEC)	
VoIP Traffic Exchanges)	

**COMMENTS OF
INTEGRA TELECOM, INC. AND TW TELECOM INC.**

October 6, 2011

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY.....	1
II. DISCUSSION.....	2
III. CONCLUSION.....	7

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Pursuant to the Commission’s September 20, 2011 *Public Notice* in the above-referenced docket,¹ Integra Telecom, Inc. (“Integra”) and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”) hereby submit these comments on Vaya Telecom, Inc.’s (“Vaya’s”) August 26, 2011 Petition for Declaratory Ruling (“Petition”).²

I. INTRODUCTION AND SUMMARY.

In its Petition, Vaya argues that interconnected VoIP traffic must be deemed subject to reciprocal compensation because (1) all interconnected VoIP traffic is inseverable and jurisdictionally interstate; and (2) the Commission does not have the authority to mandate application of access charges to interconnected VoIP traffic. Vaya is incorrect on both counts. The industry’s longstanding and successful reliance on mechanisms, such as traffic studies, for differentiating intrastate telephone calls from interstate telephone calls proves that carriers can readily differentiate intrastate interexchange VoIP traffic from interstate interexchange VoIP

¹ *Pleading Cycle Established for Comments on Vaya Telecom Petition for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges*, Public Notice, DA 11-1561 (rel. Sept. 20, 2011) (“*Public Notice*”).

² Petition of Vaya Telecom, Inc. Regarding LEC-to-LEC VoIP Traffic Exchanges (filed Aug. 26, 2011) (“*Petition*”).

traffic. In addition, the Commission has ample legal authority to require application of intrastate access charges, consistent with state law, to intrastate interexchange VoIP traffic. Accordingly, the Commission should (1) deny Vaya's Petition; and (2) in the pending intercarrier compensation ("ICC") reform proceeding, apply the same ICC rates—including intrastate access charges—to interconnected VoIP traffic that apply to TDM-based voice traffic.

II. DISCUSSION.

In its Petition, Vaya seeks a declaratory ruling that intrastate access charges do not apply to "VoIP traffic exchanges."³ In support of this request, Vaya makes two main arguments, both of which are without merit.

First, Vaya asserts that interstate and intrastate VoIP traffic are inseverable, and VoIP is therefore jurisdictionally interstate.⁴ It is of course true that the FCC has preempted some types of state market entry regulation of *purely nomadic* VoIP service (such as Vonage's DigitalVoice service) based on the difficulty of differentiating the interstate and intrastate components of nomadic VoIP service for purposes of the regulations at issue.⁵ The Commission has never, however, made such a finding with respect to *fixed* VoIP service, which undoubtedly constitutes the majority of interconnected VoIP service today.⁶ Indeed, the FCC has clarified that the

³ *Id.* at 3.

⁴ *Id.* at 3-7.

⁵ See generally *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004) ("*Vonage Order*").

⁶ Nor could the Commission make such a finding. As tw telecom has previously explained, fixed VoIP service is not inseverable because (1) there is no meaningful difference, at least for purposes of jurisdictional analysis, between the communications initiated by fixed VoIP subscribers and those initiated by circuit-switched telephone service subscribers; and (2) there is no meaningful difference for these purposes between the network architectures utilized to provide fixed VoIP service and circuit-switched telephone service. See Letter from Thomas

rationale of the *Vonage Order* is limited to purely nomadic VoIP service. Specifically, in the *VoIP USF Order*, the Commission held that “an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.”⁷

In any event, the Commission has never preempted state application of intrastate access charges to any form of interconnected VoIP traffic, whether nomadic or geographically fixed. This makes sense because carriers *can* rely on established mechanisms to differentiate all forms of interstate interexchange VoIP traffic from intrastate interexchange VoIP traffic. There is no reason to expect that the proportion of interconnected *VoIP* interexchange traffic that is interstate and intrastate is any different from the proportion of *TDM-based* interexchange traffic that is interstate and intrastate. In fact, the FCC has already established a safe harbor percentage for purposes of assessing USF contributions on interconnected VoIP service providers on this exact basis.⁸ The Commission could therefore permit carriers to use their existing carrier-specific percent interstate usage (“PIU”) factors for TDM-based interexchange traffic to estimate the percentage of their interconnected VoIP interexchange traffic that is interstate and intrastate. And where an interconnected VoIP service provider (e.g., Vonage) has no existing PIU factors for TDM-based interexchange traffic, the Commission could require it to rely on the safe harbor

Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 et al., at 2-8 (filed Oct. 23, 2008).

⁷ *Universal Service Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 56 (2006) (“*VoIP USF Order*”).

⁸ *See id.* ¶ 53 (adopting a safe harbor of 64.9 percent for the percentage of interconnected VoIP services revenues that are interstate based on the fact that “[t]he percentage of interstate revenues reported to the Commission by wireline toll providers [wa]s 64.9 percent”).

percentage for assessing USF contributions⁹ as a proxy for the percentage of its interconnected VoIP interexchange traffic that is interstate and intrastate. Thus, there is no need for the Commission to exempt interconnected VoIP traffic from intrastate access charges as Vaya requests.

Second, Vaya contends that Section 251(g) of the Act, which preserves the access charge regime that existed prior to 1996,¹⁰ does not encompass interconnected VoIP traffic because VoIP service did not exist pre-1996.¹¹ But interconnected VoIP service is merely a technological upgrade to the circuit-switched telephone service that was subject to access charges before the 1996 Act.¹² Thus, the access charge system preserved by Section 251(g) applies to interconnected VoIP traffic.

⁹ See *id.*; see also Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A, at 23 (2011).

¹⁰ See, e.g., *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, ¶ 550, n.926 (2011) (“*USF/ICC Transformation NPRM*”).

¹¹ See Petition at 7.

¹² As with the transition from analog to digital technology, the introduction of IP technology into the network does not change the classification of interconnected VoIP service as a “basic” transmission service or a “telecommunications service.” See Comments of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., CC Dkt. Nos. 01-92 et al., at 12-13 & n.38 (filed Apr. 1, 2011) (“Joint Commenters’ April 1, 2011 Initial Comments”) (citing *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion, Order and Statement of Principles, 95 F.C.C.2d 584, ¶ 16 (1983)). All “Initial Comments” and “Reply Comments” referenced herein are to those filed in CC Dkt. No. 01-92, unless otherwise specified.

Under the Commission’s rules, however, access charges apply only to “telecommunications services.”¹³ Therefore, to ensure that access charges are applied to interconnected VoIP traffic, the Commission should clarify that interconnected VoIP service is a telecommunications service.¹⁴ As the Joint Commenters have explained in this docket, there is no doubt that providers of interconnected VoIP service offer end users the same functionality—voice transmission—as is offered by providers of traditional circuit-switched telephone service; interconnected VoIP service therefore falls squarely within the statutory definition of “telecommunications service.”¹⁵

Moreover, there is no rational policy basis for treating interconnected VoIP traffic differently from TDM-based voice traffic for ICC purposes (i.e., by exempting interconnected VoIP traffic from intrastate access charges, as Vaya requests). As the Joint Commenters have previously explained, the Commission should instead apply the same ICC rates—including intrastate access charges—to interconnected VoIP traffic that apply to TDM-based voice traffic.¹⁶ This approach is sound for several reasons.

To begin with, applying the same ICC rates to all voice traffic is consistent with the Commission’s policy of “competitive neutrality.”¹⁷ Indeed, the FCC’s ICC rules should not

¹³ See 47 C.F.R. § 69.5(b). While Rule 69.5(b) applies only to interstate telecommunications services, Section 251(g) preserves “both the interstate and intrastate access charge systems.” *USF/ICC Transformation NPRM* n.750.

¹⁴ See Joint Commenters’ April 1, 2011 Initial Comments at 7-9.

¹⁵ See *id.* at 9-15.

¹⁶ See *id.* at 4-6.

¹⁷ Under this policy, the FCC’s rules should “neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.” See *VoIP USF Order* ¶ 44.

favor one form of voice service over another based on the technology used to provide the service by permitting different ICC rates for interconnected VoIP traffic and TDM-based voice traffic.

Applying the same ICC rates to all voice traffic also makes sense because, as the record in this docket makes clear, it is not technically feasible for carriers to differentiate interconnected VoIP traffic from other voice traffic terminating on their networks.¹⁸ If intrastate access charges did not apply to interconnected VoIP traffic, carriers would have an increased incentive to misidentify all of their interexchange traffic as interconnected VoIP traffic in order to minimize their ICC liability.

Finally, applying the same ICC rates to all voice traffic would eliminate costly disputes and protracted litigation about which rates apply.¹⁹ As the record in this docket demonstrates, clarifying the appropriate ICC framework for interconnected VoIP traffic would also eliminate opportunities for unlawful self-help by large carriers such as Sprint and Verizon.²⁰

¹⁸ See, e.g., Joint Commenters' April 1, 2011 Initial Comments at 6; Cablevision and Charter April 1, 2011 Initial Comments at 4; Kansas Corporation Commission April 1, 2011 Initial Comments at 15; PAETEC et al. April 1, 2011 Initial Comments at 31 ("Facilities-based CLECs are not aware of any industry standard, published or commonly accepted, to distinguish [IP-originated traffic from TDM-originated traffic]."); Windstream April 1, 2011 Initial Comments at 7 (explaining that terminating carriers lack the ability to verify claims that traffic is in fact VoIP-originated).

¹⁹ See Joint Commenters' April 1, 2011 Initial Comments at 5.

²⁰ See Bluegrass Telephone Co. April 1, 2011 Initial Comments at 29 & n.49 ("[T]he Commission's inaction and lack of enforcement against IXC self-help has emboldened carriers to the point that they now invent arguments to stop paying access charges that they have paid for years as part of a strategic and purposeful cash flow management program. By way of example, a recent decision from the Eastern District of Virginia demonstrates that, when the truth really comes to light, the excuses that Sprint uses in order to not pay carriers for access services are mere pretext for company-wide efforts to weather economic challenges on the backs of other carriers.") (citing *Cent. Tel. Co. of Va., et al. v. Sprint Commc'ns Co. of Va., Inc., et al.*, Civ. No. 3:09cv720, Memorandum Opinion, 2011 WL 778402, *3 (E.D. Va. Mar. 2, 2011)); Windstream April 1, 2011 Initial Comments at 10-11 ("[T]he Iowa Utilities Board ('IUB') this year required Sprint to pay [Windstream] for more than one year of withheld access charges for VoIP traffic."); Joint Commenters' April 1, 2011 Initial Comments at 5-6 & Attachment A (explaining

III. CONCLUSION.

For the foregoing reasons, the Commission should deny Vaya's Petition and apply the same ICC rates—including intrastate access charges—to interconnected VoIP traffic that apply to TDM-based voice traffic.

Respectfully submitted,

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October 6, 2011

that, rather than paying the access charges due under Cbeyond's tariffs, Verizon unilaterally decided to pay Cbeyond a rate of \$0.0007 per minute for origination and termination of Verizon long distance calls on Cbeyond's IP network); *see also* CenturyLink April 1, 2011 Initial Comments at 5; ITTA April 1, 2011 Initial Comments at 18 (stating that some "large carriers have recently begun to withhold access payments on [VoIP] traffic, reversing their own established practices").